RECONSTRUCTION.

SPEECH

OF

HON. JAMES HARLAN,

OF IOWA.

DELIVERED IN THE SENATE OF THE UNITED STATES,

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SPEECH.

The Senate having under consideration the Bill (H. R. 439) additional and supplementary to an act entitled "An act to provide for the more efficient government of the rebel States," passed March 2, 1867, and the acts supplementary thereto, the pending question being on the motion of Mr. DOOLITTLE, to refer the bill, with instructions, to the Committee on the Judiciary—

Mr. HARLAN said:

Mr. PRESIDENT: It is not my purpose to confine my remarks to an examination of the instructions offered by the Senator from Wisconsin, [Mr. DOOLITTLE,] nor to extend them to an examination of the details of the bill. I desire, however, to state as clearly and as briefly as I can, the reasons that influence me to support the principles involved in this bill and kindred measures of legislation. I do not doubt that the whole controversy will be concluded by the settlement of one question—a mixed question, perhaps, of law and fact—that is, whether the existing organizations in the ten States named in this bill are legal State governments, in harmony with the Constitution of the United States; for if they are, as has been maintained in this discussion on the other side of the Chamber, I think it will follow irresistibly that Congress would have no more rightful authority over the purely local affairs of the people in each one of those States, than they could exercise over the local affairs of the people of any of the twenty-seven States now represented on this floor. In the examination of this question I shall proceed in historical order.

In the year 1860 each one of these States had a constitutional State government; but these governments, it has been admitted in this discussion, were superseded by organizations which the people in those States denominated State governments. They were, however, treated by Congress in all the legislation connected with the suppression of the rebellion as void. They were so treated by President Lincoln during his lifetime, and have been so declared by President Johnson in grave State papers communicated by him to the people of those States. It has been admitted, I think, by every Senator who has addressed the Senate on this subject from the other side of the Chamber, that those organizations, beginning in the early part of 1861 and terminating during the year 1865, were void for illegality. The Senator from Maryland [Mr. JOHNSON] informed the Senate and the country that the Chief Justice of the Supreme Court of the United States, sitting as the presiding judge in the circuit court for North Carolina, so held in an actual case brought before him for adjudication. I have in my hand what purports to be a copy of the opinion rendered in that case, and read the following clause:

"There is no doubt that the State of North Carolina, by the acts of the convention of May, 1861, by the previous acts of the Governor of the State, by subsequent acts of all the departments of the State government, and by the acts of the people at the elections held after May, 1861, set aside her State government and constitution, connected, under the national Constitution, with the Government of the United States."

Then, Mr. President, it has been held by every department of the national Government, executive, legislative, and judicial, so far as judicial opinions have been rendered on that subject, that these organizations, beginning in 1861 and terminating in 1865, were void for illegality. If they were illegal, why were they illegal? They were formed each in pursuance of the provisions of law; some of them with great regularity. Constitutional conventions were assembled by virtue of laws enacted by State Legislatures, and they proceeded formally to change the framework of their governments. These organizations, moreover, became perfect in all their forms, at least to external appearance. They had an executive, a legislative, and a judicial system. They were effective, in fact so effective that they excluded from the limits of those States, in a territorial point of view, every semblance of civil government in opposition to those thus instituted. They were so far acquiesced in by the masses of the people of those States as to be resorted to for the redress of all their grievances and for the protection of all their rights, both of person and of property. These organizations also resorted to the assessment and collection of taxes and the organization of their militia, the negotiation of loans, domestic and foreign, formed new affiliations, constructed large navies, and organized and supported immense armies, that carried on a terrible war for a long period, which for vigor and effectiveness has been without a parallel on the page of modern history. They were, moreover, republican in form, at least if the Senator from Indiana [Mr. HENDRICKS] has given a correct definition of this clause of the Constitution. That Senator said:

"Now, sir, I think a republican form of government is a form of government in which the people make their own laws through legislators selected by themselves, executo their laws through an executive department chosen by themselves, and administer their laws through their own courts."

If this is a correct definition of a republican form of government, these intervening rebel governments were republican in form; for it cannot be denied that they made their so-called laws through legislators selected by themselves,

administered them by executive officers elevated to power by their own votes, and enforced them by a judiciary which they themselves had established. Having been formed in pursuance of law; having become effective in all their parts; having become the exclusive local civil government within the territorial jurisdiction of those States—for there was no opposing civil power except in the wake of the Union armies and within the limits of the Union lines—if they were republican in form, I inquire again, in what did their illegality consist?

It may be said that they failed to comply with the third clause of the fourth article of the Constitution of the United States, requiring the "members of the several State Legislatures and all executive and judicial officers, both of the United States and of the several States," to take an oath or affirmation to support the Constitution of the United States.

But, sir, this was merely an omission which could have been easily supplied, which in 1865 the leaders of these organizations proposed to supply, and were prevented by the action of the organs of this Government. It will be remembered that the Governor of Virginia proposed to President Lincoln to convene the Virginia Legislature for the purpose of calling a convention to rescind the ordinance of secession, and to repeal all laws enacted which were supposed to be in conflict with the Constitution and laws of the United States. He was prohibited in an order issued by the President to the commanding general at Richmond. The general was instructed, if those parties should persist in holding such a meeting, to disperse them, if necessary, by force of arms. A similar proposition was made to the present President of the United States by the rebel General Johnston, through General Sherman, commanding then one of the nation's armies. This proposition was forwarded to President Johnson, who issued orders interdicting a compliance with it; and afterward the Governor of Mississippi proposed to issue a proclamation convening the Legislature of that State for the same purpose, which request was also refused. In order that no doubt may exist as to the truth of these citations of current history, I read the order issued in the latter case, dated May 21, 1865:

"Major General Canby telegraphed as follows to Major General Warren, commanding the Department of Mississippi:

"'By direction of the President you will not recognize any officer of the confederate or State government within the limits you command as authorized to exercise in any manner whatever the functions of their late offices. You will prevent, by force if necessary, any attempt of any of the Legislatures of the States in insurrection to assemble for legislative purposes, and will imprison any members or other persons who may attempt to exercise those functions in opposition to your orders.'"

Then this supposed defect exists by virtue of the refusal of the authorities of the National Government to permit the people themselves to remedy it. Now, pray tell me in what the illegality of those organizations consists which have been admitted by every department of the Government, and every Senator who has spoken from the opposite side of this Chamber, to have been illegal from the beginning, and void on account of their illegality. The Committee on Reconstruction, in the report to which I will refer presently, also maintained the same position; but they state in that report that this illegality or informality might have been cured by the affirmative action of the national Government. That position has been admitted on both sides of the Chamber. The Constitution clothes the United States with power to guaranty to each State a republican form of government; and the Supreme Court has decided, in numerous cases, that, under this clause, Congress possesses the *exclusive* right to decide what is and what is not a republican government in any State. Acting under this authority, Congress has declined to vitalize these illegal organizations, and this leads me to the consideration of the character of those that now exist, for the purpose of ascertaining, if I can, the difference between these existing organizations, which Senators on the other side maintain are legal, vital, republican, and constitutional, and the organizations that preceded them, which they admit and every department of the Government has decided were void for illegality.

These were formed under the direction of the President of the United States, in pursuance of proclamations issued on the 29th of May, 1865, and subsequently prescribing the qualifications of electors and of officers, appointing provisional governors, and directing the elections of delegates to State conventions to amend the existing constitutions or to make new ones for these States. He also directed in these proclamations that the Army and the Navy of the United States should afford those provisional governors all necessary aid and assistance to carry into effect the provisions of these proclamations. Now, the first remark I have to make on this subject is, that it was not then pretended that this proceedure was in accordance with the provisions of any law, State or national, statutory or constitutional.

To be more specific, it was not pretended that this procedure was in conformity with the provisions of the old constitutions of these States, which the Senator from Indiana [Mr. HENDRICKS] seemed to think had come on down through all the bloody years of rebellion to the present time untarnished, with all their previous vigor and force. On an examination of those old constitutions no provision will be found authorizing the proceedings which the President instituted in these States under the proclamations to which I have referred; nor can anything be found in the local State laws of any one of these States authorizing any such procedure. Nor is it pretended by any one anywhere that any law of the United States existed authorizing either the President or the people in these States to initiate these State governments; and there is nothing in the Constitution of the United States, unless it be the fourth section of the fourth article, which has been so frequently referred to, clothing the Government of the United States with power to

guaranty to each State a republican form of government, and that clause, the Senators on the other side of the Chamber have maintained in this discussion, is not applicable except to a State that previously existed.

We contend that the article of the Constitution to which I have just referred invests this Government with the power to ascertain the character of a State government that has been previously formed, or to initiate a new one where none exists, while Senators on the other side maintain that it does not clothe the Government with power to initiate the organization of a State government; and on this side of the Chamber, in this discussion, it has been maintained that that provision can only be made practical through legislation by Congress, and that it is inoperative until Congress shall provide the means for carrying it into effect. And at the time these organizations were initiated, no such legislation had been enacted.

Therefore, I repeat, that these organizations were not made in pursuance of any law, State or national, statutory or constitutional. Nor were they the fruits of the voluntary action of the people of these States. This has been substantially settled by the references I have already made. The voluntary action of the people was in a different direction, as indicated in the application of the Governor of Virginia to President Lincoln to vitalize the organization that then existed, in the proposition made by the rebel General Johnston to General Sherman, and in the application made by the Governor of Mississippi to President Johnson. They proposed voluntarily to assemble, rescind their ordinances of secession, and repeal the laws which they had enacted in conflict with the Constitution and laws of the United States, and present their Senators and members at the bar of the Senate and of the House of Representatives of the Congress of the United States for admission, and thus resume their former relations.

But the President compelled them to begin *de novo* an organization of State governments from the foundation, and when any of those constitutional conventions which he had initiated declined to carry into effect the clauses of the new constitutions which he had required them to frame, he notified them officially, as President of the United States, that unless they complied with those requirements their organizations would not be recognized, and that the military government which had been instituted in those States would be continued. With what show of reason, then, can it be maintained, as it has been on the other side of the Chamber by the Senator from Indiana, [Mr. HENDRICKS,] that these organizations are the fruits of the voluntary, spontaneous action of the people? They were no more voluntary than the delivery of his purse by an unarmed traveller, on demand of a highwayman, with the mouth of a pistol at his breast. They did just so much as they were required to do by the President of the United States, and no more. They were compelled to do that by the sword; and this is what is styled the formation of State governments by the voluntary action of the people!

I am reminded here that several Senators on the other side of the Chamber have insisted that these ten States, having once been in the Union, are still in the Union, are not out of the Union, and never were. I believe the President of the United States has acted on that theory also; and I am somewhat at a loss to reconcile that theory with the admissions to which I referred in the beginning of my remarks. It is said that these States, having once been States in the Union, are still States, and still in the Union; and yet for a period of four years and more they were destitute of State governments. That is something like the existence of a man without a soul—perhaps the condition of our first parent at the beginning, when he was complete in all his parts, but without power of volition, of action, or of consciousness, until the Almighty breathed into him the breath of life.

Here it is maintained, in fact it was distinctly asserted by the Senator from Maryland, [Mr. JOHNSON,] that these States had not ceased to exist for a single moment; and yet he cited the opinion of Chief Justice Chase, for the purpose of showing that the governments which had existed in these States for a period of four years were void. That is a kind of ideal State existence which I cannot readily comprehend. But I may admit that a State may exist in the Union, and if it is at the same time granted that it is totally destitute of government, it will not weaken my argument, and the latter has been conceded.

Now, if the first of these systems of State governments was void, and the second system instituted by the President of the United States is as defective as the former—and I think I have shown that it is equally so—then it will follow that these governments, too, are void; that they have no vitality; and this position was maintained, I believe, by the Committee on Reconstruction. This committee, however, admitted that Congress might pass over these informalities and remedy these legal defects by its affirmative action. I also understood the Senator from Indiana [Mr. HENDRICKS] to state that if informalities in the organization of these State governments existed, they could be cured by Congress. This, I believe, is in conformity with the legislative history of the United States.

The people of the Territory of California, for example, without the previous enactment of an enabling law, organized a State government; that is, framed and adopted a State constitution and applied for admission into the Union. It was maintained in the discussion that the organization was illegal, and consequently void; yet that that illegality might be cured by an affirmative act of the Congress of the United States. That action was had, and California was admitted into the Union on an equal footing with the other States.

The same may be said of the formation of a State government in Michigan and in Nebraska, where the constitutions were not framed under

any existing enabling act, but the informality was passed over. On the other hand, however, the people of New Mexico and Utah, in the absence of an enabling act, framed State constitutions, elected their State officers, selected their members and Senators for seats in the Congress of the United States, applied for admission into the Union, and were not admitted. The illegality in their case was not cured, and as yet they are not recognized as States.

So in cases that have occurred since the war began. In Missouri the legal State government was overturned by the rebels, and a provisional government instituted by loyal citizens, sustained by the advice of the President of the United States and by the power of the Union armies. In Virginia the same state of facts existed. The legal State government was overthrown and a provisional government instituted. So in Tennessee. No one, I believe, has pretended that the people in these States, in setting up their provisional forms of government, acted in pursuance of law; but this informality, or illegality, if you please, was afterward cured by the enactment of laws by the Congress of the United States. They were received back, and have since enjoyed their original rights as members of the Union.

But, on the other hand, governments formed in the same mode in Louisiana, Arkansas, and North Carolina were not then recognized by Congress, and consequently they have not been restored to their original relations. So with all the ten States mentioned in this bill. Although they have proceeded informally, without authority of law, to set up State governments, doubtless Congress has power to pass over these informalities, cure these legal defects, and receive their Senators and Representatives; but Congress has not, in the exercise of its discretion, seen proper to pass such laws. Doubtless these defects could be cured to-day by the exercise of the legislative power of this nation through the Senate and House of Representatives, but it has not been done; and unless the opinions pronounced by the Supreme Court of the United States in the cases arising out of the rebellion in Rhode Island shall hereafter be overturned, that is the end of the controversy.

It is anmitted on both sides that the guarantee clause enables Congress to decide between two organizations, which is the legal one. But that concedes the whole question; for if Congress may decide between two organizations which one is republican in form, they may find, if the facts should justify it, that neither is; just as in a contest for a seat in this Chamber by two parties claiming to have been legally elected, the Constitution clothes this body with the power to decide between the applicants; but they may, if the facts established should require, decide that neither has been legally elected, or that neither is eligible to the seat, and refer the question back to be settled by the State from which they come. So in this case. If, then, Congress has not removed these legal defects, they still exist, and it must be the end of the controversy.

I know it has been insisted here, during this discussion, by several Senators, that in their opinion Congress has impliedly recognized the legality of these organizations as States in submitting proposed amendments to the Constitution of the United States, which amendments could not become valid as a part of the Constitution without the affirmation or consent of three-fourths of all the States. They say that the assent of some of these ten States was necessary to secure this three-fourths vote, and as one of these proposed amendments has been declared to be a part of the Constitution, as they maintain, in consequence of the affirmation of a part of these provisional States, Congress is concluded, unless we admit the dilemma, which they seem to think inextricable, that these organizations may be States for the purpose of affirming an amendment to the Constitution of the United States and not States for other purposes.

On this point I have two observations to make. The first is, that the concurrent resolutions proposing amendments to the Constitution of the United States were never submitted by Congress to any State *per se* or *pro forma*. They were passed just as other concurrent resolutions were enacted—just as joint resolutions and laws are passed, except that it has been held that these concurrent resolutions do not need the approval of the President. Having been passed, they were lodged with the Secretary of State, the legal custodian of all such papers, and there the action of Congress ended. Each of the other departments of the Government and every State of the Union was bound to take notice of what had been done, and to act or to decline action accordingly. Who will commit the folly of maintaining that it is necessary to proclaim a law in order to give it effect? We all know that a law enacted by Congress takes effect from the moment of its approval, or from the moment of its passage over the President's objections. So with the passage of these concurrent resolutions; no formal submission of them to any of the States was necessary, or, in fact, required.

That I am now speaking according to the record I will prove by citing a passage which I find in a letter addressed by B. F. Perry, provisional governor of South Carolina, to the Secretary of State, (Mr. Seward,) and a clause of his reply. The provisional governor says, among other things, that—

"The members of the Legislature say they have received no official information of the amendment of the Federal Constitution abolishing slavery."

The Secretary, in a letter dated November 6, 1665, replies:

"Neither the Constitution nor laws direct official information to a State of amendments to the Constitution by Congress." (See McPherson's Manual, page 23.)

He proceeds to add, however, that a certified copy will be communicated by himself, but that no such action was required of this Government, either by the Constitution or laws of the United States. They were bound to take official notice of what had been done by the Congress of the United States.

My second observation is, that it is possible, I think, for an act which has been performed by an inchoate State, void at the time it is performed, to become legal by the subsequent action of this Government; and I come to this conclusion from the history of the formation of new State governments, to which I have before referred. The dilemma logically is equally great in either case. Here you require the people of a Territory to form a State constitution, the fundamental law for the government not only of the people, but of the Legislature and officers of the State. The Senator from Indiana [Mr. HENDRICKS,] maintains that, to form a constitution, or to amend a constitution previously existing, requires the highest act of sovereignty that a State can exercise. Here the people of a Territory, before they are a State, are required to put forth an act of sovereignty, doubtless void at the time, but which afterwards acquires legality, becomes vital by the act of the national Government, to which it is officially addressed. So it may be with the action of these States in their transition period; they may put forth acts which, if not ratified or recognized afterwards by the national Government, would be totally void, and yet may be binding when that action shall have been had.

But be this as it may, it is clear that the Congress of the United States never intended, by the passage of these concurrent resolutions, to declare that these organizations called governments, formed irregularly without authority of law, had, by the action of this Government, become legal and binding. There can now be no doubt on that subject, because Congress has since enacted a law declaring in so many words that these State goverments are illegal and must be considered provisional only, but that their machinery may be adopted by the officers of the national Goverment, civil and military, for the administration of justice, for the protection of the rights of person and of property, and in carrying out the measures which the Government deems necessary to secure the organization of legal State governments within the limits of these jurisdictions respectively.

But it is said if they are not legal, and Congress has power to legalize them, it ought to be done; that the peace and welfare of the country require it; and, indeed, it has been said by Senators on the other side of the Chamber that, so far as Republican members of Congress are concerned, they are committed to the adoption of this course, they are morally concluded on this subject, because President Johnson adopted and has been carrying out the policy inaugurated by President Lincoln. They insist that since the Republicans sustained the administration and policy of President Lincoln, therefore, to preserve their consistency, they are bound to sustain this policy in the hands of the succeeding President. The Senator from Indiana [Mr. HENDRICKS,] was more explicit on this point than any other Senator; but he and others say that President Johnson took up the paper—meaning the North Carolina proclamation—just as it dropped from the fingers of the murdered President. I believe he said that it was in President Lincoln's own handwriting, had been originated by him, and submitted by him to the members of his own Cabinet, who were continued in office by President Johnson.

Some of these allegations are not susceptible of proof. I know personally that that paper was not in the handwriting of Mr. Lincoln, and every one who has read the testimony delivered by the Secretary of War before the House Committee on the Judiciary must know that it did not originate with Mr. Lincoln. The Secretary of War says that it originated with himself in his own office, and was by him submitted to the President. Perhaps it may not be amiss for me to state here a fact which has been partially stated by others elsewhere, that the vital feature of this proclamation was not approved by a majority of that Cabinet. I would not state the exact facts on this point, had they not been partially developed by the President himself, in a communication sent to this body, which has since, by the action of the Senate, been made public, and if I did not recognize the fact, or the alleged fact, that he is in the habit of communicating conversations which occur in Cabinet council to the reporters of public newspapers. If he does not consider these conversations in the character of confidential communications between himself and those who serve under him, perhaps I am not bound to so regard them.

Then I state here, without fear of contradiction from any quarter, that on the day the President decided to issue that proclamation in the form in which it was issued, five of the heads of Departments, as then represented, did not concur with him on that feature which has since become the vital feature and the occasion of so much discussion throughout the country. The Navy Department, on that occasion, was represented by the Assistant Secretary. He, the Secretary of War, the Attorney General, the Postmaster General, and the Secretary of the Interior, all insisted that suffrage, in some form, ought to be granted to the colored population of these States. Then the policy of President Johnson, or this feature of it, was not approved by the Cabinet of President Lincoln, which was afterward continued in power by the action of President Johnson. Nor did the President himself, or any member of that Cabinet, regard these organizations thus inaugurated in the light of permanent State governments. Neither the President nor any member of that Cabinet ever advanced such an idea until late in the year 1865, a few days preceding the assembling of the Congress. If any one can entertain a doubt on this subject, it may be settled by a few citations. I read a communication from W. L. Sharkey, provisional governor of the State of Mississippi, addressed to the Secretary of State:

JACKSON, MISSISSIPPI, *July* 21, 1865.

Hon. W. H. SEWARD, *Secretary of State:*

A negro was murdered by a white man, neither of them belonging to or connected with the army. The crime is punishable under our law with death, as any other murder.

The accused is in military custody in Vicksburg. General Slocum refuses to obey a writ of *habeas corpus* issued by a judge competent to issue, but claims the right to try him by military authority. If this be triable by military authority, why not all other crimes, and what is the use of civil government? The record will be sent on.

W. L. SHARKEY, *Provisional Governor.*

Here is the Secretary's reply:

WASHINGTON, *July* 24, 1867.

W. L. SHARKEY,
Provisional Governor Mississippi, Jackson.

Your telegram of the 21st has been received. The President sees no reason to interfere with General Slocum's proceedings. The government of the State will be provisional only, until the civil authorities shall be restored, with the approval of Congress. Meanwhile military authority cannot be withdrawn.

WILLIAM H. SEWARD.

(See report of Impeachment Committee, page 1097.)

I have here also the reply of the Secretary of State to the provisional governor of Florida, dated September 12, 1865, in which he says:

"It must, however, be distinctly understood that the restoration to which your proclamation refers will be subject to the decision of Congress."—*Ibid.*, page 1103.

The Senator from New York [Mr. CONKLING,] has kindly furnished me with additional evidence on the point, from which I was about to depart—the testimony of the General-in-Chief of our armies, taken before the same committee to which I have previously referred:

"*Question.*—You understood that Mr. Lincoln's plan was temporary, to be either confirmed or a new government set up by Congress?

"*Answer.*—Yes; and I understood Mr. Johnson's to be so too."—*Ibid.*, page 825.

And that was the understanding by every one at that time connected with the Government, or, at least, no opposing opinion was ever announced.

Why, Mr. President, this assertion that President Johnson adopted the policy of President Lincoln on the subject of reconstruction, in the face of current history, seems to me so absurd and ridiculous that it ought not to have been insisted on in this Chamber. I know, what nearly every Senator here probably knows, that on that subject President Lincoln never had a policy. When his political friends surrounded him and asked him to establish a policy, in order that his purposes might be known to his friends, that they might be defended in and out of Congress, he replied uniformly in nearly these words: "Having a policy is the thing which I have been always anxious to avoid." He did not desire to be trammelled in his future action by preconceived and previously adopted opinions. He wished to be free, as events occurred rapidly of a startling character, to do that which at the time might seem to him to be for the best interests of our country. That I am not in error in this I will now establish by referring to his own statements.

It will be remembered that some time in the year 1864, a bill for the organization of the rebel States was passed by the two Houses of Congress. It reached the Executive but an hour before the adjournment, and failed to receive his approval. That bill is usually known as the Winter Davis or Wade bill. It was the occasion of great controversy throughout the country and considerable dissatisfaction between different friends of the late President. During the recess the President issued a proclamation in regard to it, in which occurs this passage:

"Now, therefore, I, Abraham Lincoln, President of the United States, do proclaim, declare, and make known, that while I am (as I was in December last, when by proclamation I propounded a plan for restoration,) unprepared by a formal approval of this bill to be inflexibly committed to any single plan of restoration; and while I am also unprepared to declare that the free State constitutions and governments already adopted and installed in Arkansas and Louisiana shall be set aside and held for nought, thereby repelling and discouraging the loyal citizens who have set up the same as to further effort, or to declare a constitutional competency in Congress to abolish slavery in States, but am, at the same time, sincerely hoping and expecting that a constitutional amendment abolishing slavery throughout the nation may be adopted, nevertheless I am fully satisfied with the system for restoration contained in the bill, as one very proper plan for the loyal people of any State choosing to adopt it; and that I am, and at all times shall be, prepared to give the executive aid and assistance to any such people as soon as the military resistance to the United States shall have been suppressed in any such State, and the people thereof shall have sufficiently returned to their obedience to the Constitution and the laws of the United States, in which cases military governors will be appointed, with directions to proceed according to the bill."

Here Mr. Lincoln declared that he was not prepared to adopt any plan as the only plan. He had indicated one mode for reorganization in the States of Louisiana and Arkansas. He proposed to adhere to that until he was able to perceive that it would not subserve the best interests of the country; but, in relation to every other State that might attempt reorganization, he declared his willingness to advise them to pursue the plan indicated in the bill as one very proper mode of reconstruction.

But, sir, I read in the next place from the last speech that ever fell from the lips of that departed statesman, delivered before the populace of this city on the night of April 11, 1865, three days before his assassination. In that speech, among other things, he says:

"When the message of 1863, with the plan before mentioned"—

Referring to the organization of provisional governments in the States of Louisiana and Arkansas—

"reached New Orleans, General Banks wrote me he was confident that the people, with his military co-operation, would reconstruct substantially on that plan. I wrote him and some of them to try it. They tried it, and the result is known. Such only has been my agency in getting up the Louisiana government. As to sustaining it, my promise is out, as before stated. But, as bad promises are better broken than kept, I shall treat this as a bad promise, and break it whenever I shall be convinced that keeping it is adverse to the public interest. But I have not yet been so convinced."

Here is a clear declaration that he would not adhere to that plan, even in relation to Louisiana and Arkansas, longer than he was able to perceive it would subserve the best interests of the country. Toward the close of the speech he uttered these significant remarks:

"I repeat the question, 'Can Louisiana be brought into proper practical relation with the Union sooner by sustaining or by discarding her new State government?' What has been said of Louisiana will apply generally to other States; and yet so great peculiarities pertain to each State, and such important and sudden changes occur in the same State, and withal, so new and unprecedented is the whole case, that no exclusive and inflexible plan can safely be pre-

scribed as to details and collaterals. Such exclusive and inflexible plan would surely become a new entanglement. Important principles may, and must, be inflexible.

"In the present situation, as the phrase goes, it may be my duty to make some new announcement to the people of the South. I am considering, and shall not fail to act when satisfied that action will be proper." (See McPherson's History of the Rebellion, pages 609-10.)

Now, sir, in view of these plain declarations of President Lincoln, one of them his last public utterance, is any one justifiable in saying that President Lincoln had at the date of his death ever settled on any fixed plan for reconstruction? He says in this speech that fixing on any one plan would doubtless prove in the future a new entanglement, and he makes this utterance in perfect harmony with his reply to you, sir, (addressing the President of the Senate,) when you and others on this side of the Chamber insisted that he should settle on some fixed plan, that that was the precise thing which he had been anxious to avoid. He was not willing to be trammelled by previous opinions, which, for consistency's sake, the people might suppose him bound to carry out in practice. That he would have adopted the leading features of the plan proposed in the North Carolina and subsequent proclamations of President Johnson, I do not doubt. That he would have disfranchised many or punished criminally any of the rebels I do not believe. But that he would have enfranchised a large number, nearly if not quite all the colored population, in connection with the proclamation of universal amnesty, I do firmly believe—a belief, however, growing out of my intercourse and that of others with that fallen statesman. This was in conformity with the views which he had expressed privately preceding his death. That he would have ignored a law of Congress, especially if it had been adopted by a two-thirds vote of both branches of Congress, nobody who knew him can believe for a single moment. Why, sir, he considered the passage of a bill which had not become a law, a sufficient intimation of the will of this nation to justify him in adopting it, as has been seen from the passage which I have read from one of his public proclamations.

If we are not bound, therefore, as the friends of President Lincoln, to sustain in its details and inflexibly the policy of President Johnson, as a kind of administrator, *de bonis non*, of the policy of President Lincoln; if we are still at liberty, without a breach of consistency, to do what the best interests of this great nation may seem to require, the question still recurs, Congress having the power to legalize these illegal governments, ought it to be done? On that point I propose to read a few passages from the report of the Committee on Reconstruction, for the purpose of ascertaining, if I can, in the light of the facts there set forth, what the best interests of the country do demand.

It will be remembered that this committee was organized by the joint action of the two branches of Congress, and that they called for and obtained from the President of the United States all the papers and records and facts in his possession which he was willing to communicate bearing on the subject; and after perusing these papers and records and examining these facts, the committee proceeded to subpœna and examine a very large number of witnesses. I find here in this report, judging from the length of the lists of names, the testimony of about a thousand witnesses, taken from all classes of society, citizens or sojourners in these States.

After examining these witnesses, including leaders of the rebel and Union armies and leading men connected with the civil organization of the so-called rebel governments, they report the following facts:

"In all these States, except Tennessee and perhaps Arkansas, the elections which were held for State officers and members of Congress had resulted almost universally in the defeat of candidates who had been true to the Union, and in the election of notorious and unpardoned rebels—men who could not take the prescribed oath of office, and who made no secret of their hostility to the Government and the people of the United States."

I read also from the same report, page 16, the following passage:

"Allowed and encouraged by the Executive to organize State governments, they at once place in power leading rebels, unrepentant and unpardoned, excluding with contempt those who had manifested an attachment to the Union, and preferring, in many instances, those who had rendered themselves the most obnoxious. In the face of the law requiring an oath which would necessarily exclude all such men from Federal offices, they elect, with very few exceptions, as Senators and Representatives in Congress, men who had actively participated in the rebellion, insultingly denouncing the law as unconstitutional."

On page 17 the committee say:

"They [the witnesses] also testify that without the protection of United States troops Union men, whether of northern or southern origin, would be obliged to abandon their homes."

Again:

"The general feeling and disposition among all classes are yet totally averse to the toleration of any class of people friendly to the Union, be they black or white; and this aversion is not unfrequently manifested in an insulting and offensive manner."

Again:

"The witnesses examined as to the willingness of the people of the South to contribute, under existing laws, to the payment of the national debt, prove that the taxes levied by the United States will be paid only on compulsion and with great reluctance, while there prevails, to a considerable extent, an expectation that compensation will be made for slaves emancipated and property destroyed during the war. The testimony on this point comes from officers of the Union Army, officers of the late rebel army, Union men of the Southern States, and avowed secessionists, almost all of whom state that, in their opinion, the people of the rebellious States would, if they should see a prospect of success, repudiate the national debt."

Again:

"Southern men who adhered to the Union are bitterly hated and relentlessly persecuted. In some localities prosecutions have been instituted in State courts against Union officers for acts done in the line of official duty, and similar prosecutions are threatened elsewhere as soon as the United States troops are removed." * * * *

"Unfortunately the general issue of pardons to persons who had been prominent in the rebellion, and the feeling of kindliness and conciliation manifested by the Executive, and very generally indicated through the northern press, had the effect to render whole communities forgetful of the crime they had committed, defiant toward the Federal Government, and regardless of their duties as citizens. The conciliatory measures of the Government do not seem to have been met even half-way. The bitterness and defiance exhibited toward the United States under such circumstances are without a parallel in the history of the world."

From this examination the committee came to the following conclusion:

"That Congress would not be justified in admitting such communities to a participation in the Government of the country without first providing such constitutional or other guarantees as will tend to secure the civil rights of all citizens of the Republic; a just equality of representation; protection against claims founded in rebellion and crime; a restriction of the right of suffrage to those who have not actively participated in the efforts to destroy the Union and overthrow the Government; and the exclusion from positions of public trust of at least a portion of those whose crimes have proved them to be enemies to the Union and unworthy of public confidence."

To this report I find the following signatures: W. P. FESSENDEN, JAMES W. GRIMES, IRA HARRIS, J. M. HOWARD, and GEORGE H. WILLIAMS, on the part of the Senate; and on the part of the House, THADDEUS STEVENS, ELIHU B. WASHBURNE, JUSTIN S. MORRILL, JOHN A. BINGHAM, ROSCOE CONKLING, and GEORGE S. BOUTWELL; two of the latter being now honored members of this body.

These facts, therefore, have been found by a jury appointed by the Senate and House of Representatives composed of those of the largest experience in statesmanship. They are not seriously controverted in the minority report, signed by the honorable Senator from Maryland [Mr. JOHNSON] and two members of the House of Representatives, [Messrs. A. J. ROGERS and H. GRIDER.] They contest the theory of the report of the majority, but do not seriously question the facts, nor could they, for the testimony of these witnesses is here recorded and may be perused by any gentlemen who chooses to read.

This, then, is the reason why Congress does not, and cannot justly and with safety, vitalize these illegal organizations in the ten States to which the bill refers. As in the case of the organizations previously pronounced void, the local governments are in the hands of those who were the leaders in the rebellion, almost without a single exception; and this report states, what the dispatches which I have here from the provisional governors state, that nearly every member elected to the House of Representatives and to this body was unable to take what is familiarly styled the test-oath.

And that brings me to consider the statement made by the Senator from Indiana, [Mr. HENDRICKS,] that the objections to these organizations raised by Senators on this side of the Chamber could not be treated seriously. Here are his words:

"You cannot say to me that you did not intend traitors to come here and sit with you, because you had passed a law in 1862 saying that no man who had given aid to the rebellion should sit here. You claim that law to be valid and constitutional, and that it keeps out of these Chambers and from every Federal office every man that participated in the rebellion or gave it aid or comfort. Then why have you kept this country distracted, its business disturbed, the hopes of the people depressed, for two years, when these constitutions with these provisions came to you, and there was nothing to do but to admit the States to representation? Answer that question to the judgment of the country, and your policy of reconstruction will stand better in popular judgment."

At the time I was in doubt whether the Senator was serious or whether this should be treated as a playful remark. I find it, however, still standing in his reported speech as above quoted. It doubtless has been published by multiplied thousands and scattered over the country, and therefore we are compelled to treat it seriously. Let us illustrate the probability of the effectiveness of this barrier to the admission of rebel candidates for this and the other Chamber by current history. Soon after Congress declared the State of Tennessee in a condition to be represented in the Senate and House of Representatives, two distinguished gentlemen, citizens of that State, presented themselves here, demanding admission. One of them was admitted at once; but it was whispered that there was a barrier in the way of the admission of the other; that the test-oath could not be truthfully taken. In that oath, Senators will remember, occurs the following clause:

"That I have neither sought nor accepted nor attempted to exercise the functions of any office whatever, under any authority or pretended authority, in hostility to the United States."

It was known that one of the Senators elected from that State had held, under the rebel government of Tennessee, the high and important office of a judge of a court. He could not, therefore, take this oath truthfully, in the words in which it is couched. And here, in justice to myself and to the Senate, as well as in justice to that Senator now sitting as a member of this body, I ought to remark that I do not impugn to him any improper motives. But you will remember that the Judiciary Committee, finding this apparent barrier across the pathway to his seat, reported, and the Senate adopted, a joint resolution repealing that clause of the oath for his benefit. That resolution was non-concurred in by the House of Representatives. The question was then remitted to the Senator himself. He was called on to decide for himself whether he could take the oath prescribed in the law to which the Senator from Indiana referred, and he took the oath.

Mr. PATTERSON, of Tennessee. Will the Senator from Iowa allow me to interrupt him for a moment?

Mr. HARLAN. Certainly.

Mr. PATTERSON, of Tennessee. The Senator is mistaken in stating that that resolution was reported by the Judiciary Committee. It was a resolution offered by the chairman of that committee after the report was made.

Mr. HARLAN. That may be so. I am gratified to be corrected.

Mr. PATTERSON, of Tennessee. The Judiciary Committee reported that I could take the oath; but the chairman of the Judiciary Committee thought there was a technical objection, and he submitted a resolution to modify the oath so far as I was concerned. It passed the Senate almost unanimously, and went to the House, and there was defeated. I took the oath. I could do it again. I could do it every day. That is the history of the transaction.

Mr. HARLAN. I am obliged to the Senator for the explanation. I do not wish to be understood by him as saying that he violated his own

conscience in taking that oath. I doubt not but that he adopted the old scriptural adage that "whilst the letter killeth, the spirit maketh alive." He could not take the oath in these technical terms truthfully; but he was conscious of his own patriotism; he knew that he had accepted and held that office for the protection of the Union men of Tennessee who were his neighbors; and, believing himself justified in accepting the office for that laudable and patriotic purpose, he did not consider that it came in conflict with his conscience when the oath was presented him in this precise form. But, sir, I present this case to show that that oath, even when it cannot be taken truthfully, according to its terms, is not a barrier to admission to a seat in this Chamber or in the other branch of Congress.

Why, sir, we have another case pending here now: a Senator-elect from the State of Maryland, standing at the bar of the Senate demanding admission to his seat. In the discussion thus far it has been stated on this side of the Chamber, and I think not seriously called in question, that during the whole progress of the war his sympathies were with the rebels; that he permitted a minor son, with full knowledge of his purpose, to enter the rebel service is not questioned. That he advanced means to enable him to do so is testified to by the son himself; doubtless under the conviction, on his part, that to make war against the Government of the United States was not a high crime or misdemeanor that would blight the conscience and blast the reputation of his child. Believing that he could do it with comparative, if not entire innocence, and the boy having failed to collect money from the sale of a water-craft, and that fact coming to the knowledge of the father the night preceding the son's departure, the father advanced him means which the boy used in wending his way to the rebel army. And yet, in the face of these facts, it is seriously insisted on the other side of the Chamber, and not repelled with much vigor from this, that it is a question for the conscience of the applicant himself, and if he can conscientiously take the oath, then he may be admitted.

Let me illustrate this by a reference to a scrap of history connected with proceedings in Maryland. In that State, under the State laws, an oath was prescribed to be taken by any candidate for the exercise of the right of suffrage, if challenged. The law was enacted, and the oath prescribed, to prevent the returned rebel soldiers from voting. It was not deemed by the loyal people of Maryland to be safe to permit returned rebel soldiers to exercise this right, and thus shape the policy of a loyal State of the Union. These rebels, when they found this barrier across their pathway to the ballot-box, sought legal counsel, and, among others, took the opinion of the able—I may say the illustrious—Senator now sitting in this Chamber from that State. He advised that that law prescribing the oath was itself unconstitutional; that the courts would doubtless hold it to be void; and therefore that the applicant could take that oath without violating his conscience or incurring justly the pains and penalties of perjury. Moreover, if I remember correctly the statement of that opinion, as published at the time, the Senator asserted that it was in a certain sense the duty of the citizen to take the oath when in no other mode could he be able to exercise his undoubted right as a citizen of that State. And they did take it; and enough of them voted to overthrow the policy of the State of Maryland; so that all the Union men of that State who were elevated to place and power have been and are being turned out; and a very short time since, so complete was this revolution, that in the election of a successor to the honorable Senator, he was able to receive but one or two votes; so soon did the bitter fruits of his unwise counsel return to the lips of the man who gave it.

Now, sir, we are asked to trust to the sufficiency of this oath to protect the Senate and House of Representatives from the ingress of rebel Senators and members elect, when every Senator on that side of the Chamber has insisted that this law, like the law of Maryland on the same subject, is unconstitutional and void.

Mr. HENDRICKS. As I participated somewhat in the debate on Governor Thomas's case, and as I was a member of the committee who reported upon that case, perhaps the Senator may refer to my views upon that question; and if so, he does not correctly state them. My views upon the constitutionality of that law were expressed in the Senate some two or three years ago; but always, when the question has been before the Senate, I have said this: That while that law remained upon the statute-book I should not vote to allow any man to take his seat, if, in taking that seat, he had to swear falsely in that oath; that I thought such a man ought not to be admitted.

Mr. HARLAN. Doubtless the Senator states his own opinion correctly; but I wish to ask him whether, when the bill requiring that oath was pending here in this Chamber, he thought it was unconstitutional?

Mr. HENDRICKS. I was not a member of the Senate when that bill passed, and so could not express any view, either in debate or by a vote; but after I came into the Senate, when the question was up in regard, perhaps, to the seat of Mr. BAYARD, of Delaware, I expressed the opinion, which I yet entertain, that Congress can add no qualifications to those qualifications of a Senator of the United States defined in the Constitution. But I have said this—then, now, and all the time: that while that law remains upon the statute-book I will not vote to admit any man to a seat on this floor who would be compelled to swear falsely in taking the oath which would entitle him to a seat.

Mr. HARLAN. I repeat, the Senator doubtless states his own opinion correctly. Nevertheless, he insists here that, in his opinion, this law is unconstitutional. It is the only barrier between seats in Congress and the rebel Senators and Representatives elected from these ten States; and yet he maintains that this law is a

sufficient protection, because he himself would not vote to admit them to seats, if they could not take it without violence to the truth, when he knows that the same question has been submitted to the masses of the rebel soldiers of Maryland, and that by multiplied thousands they have taken the oath. He knows, moreover, that nearly every Senator and member elect from these ten States is unable to take the oath truthfully.

Mr. HENDRICKS. The Senator says I know a state of facts in regard to Maryland of which I have heard nothing. I never heard that this oath was submitted to the people of Maryland. I do not wish him to attribute to me any knowledge of any such business that I know nothing of.

Mr. HARLAN. I have not said I derive my knowledge on that subject from the Senator from Indiana. I derive it from current history, which I apprehend the Senator will not seriously call in question.

To pursue the line of my remarks, it is known to him and known to every sitting member of this body that nearly every Senator and member elect of those ten States is unable truthfully to take that oath. I have here a telegram from the provisional governor of Georgia, in which he informs the President of the United States that no one of them from that State can do so, and that all the members of the State constitutional convention are in the same condition. This is true of nearly all the members of these conventions, of State officers, and members and Senators elect. But they believe, as does the Senator, that this law is unconstitutional. With them, therefore, this oath will not prove an insurmountable obstacle.

They would maintain that it is a question for each member and Senator-elect to settle for himself, as it was left to the Senator from Tennessee to settle for himself, in the case to which I have previously referred. And if left to those members and Senators elect to settle, each for himself, they believing the law unconstitutional, who can doubt that every one of them would swallow it? Otherwise, why were they elected? They doubtless all knew before they were elected that their names were being used as candidates. Why did they not decline these elections, if they regarded themselves as ineligible? Ah, sir, why did the people of those States elect them to seats in the other House? Why did the Legislatures elect them to seats in this Chamber? If they knew of the existence of this law, and believed, as the Senator from Indiana now says he believes, that it is, or ought to be, considered a barrier to admission, why did they not publish their ineligibility and permit the people and the Legislatures to elect men who could accept the offices? Would an honorable man under thirty years of age permit the Legislature in his State to elect him to a seat in this body, knowing himself to be ineligible? And would members of the Legislatures, knowing of this ineligibility under the Constitution and laws of the United States, throw away their votes?

Sir, it is manifest, as plain as the light of the blazing sun at noonday, that every one of these men expected to be admitted to his seat, either by swallowing the oath or by securing the repeal of the law; or more probably by evading it in the mode proclaimed at one time as a part of the policy of the supporters of the present Executive. It has been declared, and never authoritatively denied, that one object of stumping the United States by the Executive of this nation and several of his heads of Departments, was to secure the election of a sufficient number in the North holding kindred views with the Senator from Indiana and the rebels of the South, so that, when united with those elected from the South, they would form a majority of the members of the other branch of Congress; and on the first day of the present Fortieth Congress they were expected to convene in that Hall, with their certificates of election in their pockets, when each man would be the peer of his neighbor, and they, being in the majority, would organize that body, communicate with the President, secure his recognition, and then compel the Senate to receive their colleagues or block the wheels of the national Government. The probabilities of this may be argued, as it seems to me, from the marked similarity of views, expressed here and elsewhere, entertained by the leading members of the Senate on that side of the Chamber and of their political associates in the country, and the leaders of the rebellion.

And here I wish to do one class of Democrats justice. In these remarks I refer only to that portion of them usually denominated copperheads. They and the rebels all believe that these States to which the bill refers had the right to secede. They believe that President Buchanan interpreted the Constitution and laws correctly in his official message to Congress, when he said that he failed to discover in the Constitution power in this Government to coerce the obedience of seceding States. These men, North and South, have maintained uniformly that the war prosecuted by the Government of the United States to coerce obedience was illegal, and that all laws enacted by Congress for this purpose ought to be treated as void; and, consequently, that the debt incurred in the support of the Army and Navy during the prosecution of this war was illegally contracted, and therefore ought not to be paid. They maintain, further, that these States having been illegally invaded, they having been interfered with by force in the enjoyment of a constitutional right, they had the undoubted right to repel force with force; that the war on their part was legal and constitutional; and that the debt therefor contracted in its support, was a legal debt, morally and constitutionally binding. They maintain, moreover, in the North and in the South, as represented in this Chamber, that the emancipation of slaves by the national Government was unconstitutional; that the destruction of the property of private individuals by the Union armies was unjustifiable, both in violation of law and the policy usually pursued by civilized

nations, and therefore that these sufferers have a right to indemnity.

Now, sir, entertaining these views, as I doubt not they do, conscientiously and honestly, permit the representatives of these opinions from these ten States of the South and those who concur with them from the northern States to secure a majority of the two branches of Congress, and who can doubt but that they will follow this theory to its inevitable, irresistible, logical consequences? And hence they testified before the Reconstruction Committee that if they had the power they would evade the payment of the national debt; and if they had power they would secure payment for their slaves and for property destroyed during the war. Then, sir, was not the precaution indicated by that committee and since observed by Congress, a wise and a justifiable precaution, unless we desire not only to place the local governments of those States in the hands of the enemies of the Republic, but to place the legislation of Congress also as completely under their control?

But here I am met with the remark that there are but few of them; that these ten States would be entitled to but twenty Senators, and perhaps about forty-eight or fifty members of the other House; and if they were admitted, even if they did evade this test-oath or swallow it, they could do but little harm, because the majority from the other States would be so large that they could at any time vote them down. Let me test the wisdom of such a remark. In nearly every State there is a law disfranchising felons. Do the Legislatures of the States suppose that in any one of them the felons are in a majority, and that the honest men could not at any time vote them down if they were not disfranchised? Then why so uniformly do we find such a provision on the statute books of the States? Because the people desire to preserve the purity of the ballot-box, as well as a patriotic representation in their local offices and the offices of the Federal Government. Here, then, even in that case, it is possible that one rogue, if he had the right to vote, might hold the balance of power in the election of State officers; might control the character of the Legislature, and might therefore control the character of the representative of the State in this Chamber. How much more, therefore, is it possible—yea, probable—that twenty members of this body and fifty members of the other House might hold the balance of power, especially taken in connection with the fact that I have recited? In the face of this uniformity of opinion entertained by the Democracy of the North and West, and the rebels of the South, on these grave questions of the validity of the national debt, and the right of the rebels to vitalize their debt, and to secure payment for their slaves and property destroyed during the war, who can pretend that it would not be dangerous to place twenty more men in this Chamber entertaining such views, and fifty more in the other branch of Congress?

If, then, this Government is justifiable in refusing to vitalize these illegal State organizations; if it is necessary for the protection of the people, in order that they may not be hereafter saddled with an immensely augmented national debt, we come to the inquiry, whether we have the power to do so. That has been partially disposed of in the remarks which I have already submitted; but I now address myself to it directly, because the constitutionality of all these measures has been called in question so directly by so many Senators during this discussion. They do not express it as their opinion merely that these laws are unconstitutional, they declare it as an admitted fact. Moreover, they declare that the majority in this and the other branch of Congress enacted these laws knowing them to be unconstitutional. The Senator from Indiana [Mr. HENDRICKS,] said that it had been admitted by leading members of this and the other branch of Congress that these enactments were outside of the provisions of the Constitution. When this was disclaimed by every Senator to whom he alluded, he was compelled, being thus driven to the wall, to retire under a newspaper copy of a letter supposed to have been written by the great Commoner from Pennsylvania. He was not here to answer for himself. Had he been, I doubt not he, too, would have maintained that he never made such an utterance; that is that they were enacted outside of the Constitution, in the sense of being in conflict with it.

But it has been charged by several of these Senators that those on this side of the Chamber have voted for these laws and sustained this policy for partisan purposes. In ordinary times I should regard this as a very grave charge. Ten members on that side of the Chamber, in a full Senate, charged forty-three on this side with knowingly, willfully, trampling under their feet the fundamental law of the nation, violating their oaths of office, sitting here with blighted consciences before God, and, if the allegation be true, deserving nothing so much as the scorn of all honest men. Sir, whence did these ten Senators derive authority to sit in judgment upon the forty-three? Is it because they know so much more than their associates here? Is it because their consciences are so much more pure? Is it because they have manifested patriotism of a character so much higher? Is it because they have displayed knowledge of constitutional law of a character so much more profound? However exalted these Senators may be in all these respects, I maintain they are no more—I do not desire to say they are any less—than the peers of those on this side of the Chamber. Are not the avenues of knowledge equally open to those who differ with them in opinion? When they say that the forty-three violate willfully and knowingly the Constitution of the United States for partisan purposes, I am amazed that Senators of their acuteness do not perceive that they bring into requisition a catapult that can be brought to bear with equal vigor against the wall of their own castle. Do men usually display greater zeal or make larger sacrifices to

continue in power than they do to acquire place? If so, the philosophers from the beginning of civilization have been at fault in supposing that a hungry swarm of flies was more dangerous than the one previously satiated.

But, sir, are their views sustained by any other department of the Government? I do not remember having noticed any decision pronounced by any of the courts of the United States calling in question the constitutionality of these laws. An opinion, I know, has been cited here, pronounced in what is familiarly known as the Milligan case in Indiana, which is supposed to question the validity of some law of the United States. I inquire what law? When you come to review that opinion, you will find the court decided that there was no law authorizing the organization of a military court in Indiana under the circumstances that then existed, not that Congress had enacted a law on that subject which they found to be in conflict with the Constitution of the United States; but there was a total absence of Congressional action.

It is true that some of them—one or two, I believe, of the judges—did what the Senator from Illinois [Mr. TRUMBULL] describes as "slopping over," and advanced the opinion that Congress could not pass such a law. Well, sir, whether Congress could or could not pass a law authorizing a military court to sit in Indiana in time of peace, is not the question before the country nor the question under consideration by me. The question is, Did the court hold in that case that any law of Congress on the statute-book assuming to authorize that military court, was in conflict with the Constitution of the United States? They rendered no such decision.

The next case that I can now recall is the decision said to have been given by Justice Miller, of the United States Supreme Court, in St. Louis, calling in question the constitutionality of the test-oath, to which I have previously referred. In that case the court held that in its application to cases arising out of facts that existed previous to the passage of the law, the law was void—not void generally on account of being in conflict with the provisions of the Constitution of the United States, but, as the passage of *ex post facto* laws are prohibited by the Constitution, its provisions could not be properly applied to cases growing out of facts that existed before the law was enacted. This and the case previously referred to are the strongest if not the only decisions that I have heard cited; and neither of them decides that Congress has surpassed its constitutional authority. Why, sir, in several other cases, copies of the reports of which I have here, and to some of which I have previously referred, the courts maintain specifically that these laws are constitutional. I hold in my hand the report of a case that occurred recently in Maryland, in which the Chief Justice of the United States, sitting as the circuit judge, held as follows:

"If this were otherwise, the indenture set forth in the return does not contain important provisions for the security and benefit of the apprentice which are required by the laws of Maryland in indentures of white apprentices, and is, therefore, a contravention of that clause of the first section of the civil rights law, enacted by Congress on the 9th of April, 1866, which assures to all citizens, without regard to race or color, 'the full and equal benefit of all proceedings for the security of person and property as is enjoyed by white citizens.'

"4. This law, having been enacted under the second clause of the thirteenth amendment, in enforcement of the first clause of the same amendment, is constitutional, and applies to all conditions prohibited by it, whether originating in transactions before or since its enactment.

"5. Colored persons, equally with white persons, are citizens of the United States.

"The petitioner, therefore, must be discharged from restraint by the respondent."

Here the Chief Justice holds directly, and pronounces in so many words, that the civil rights bill is constitutional. I have another report here, among the multitude that might be produced, of a decision rendered by Justice Swayne in a case originating in Kentucky; a case criminal, I believe, in its character, in which some white men broke into the house of a colored woman. The perpetrators of this offense were arraigned before the State courts. The woman appeared as a witness, and under the laws of Kentucky was excluded from testifying. Under the civil rights bill the case was transferred from the State court to the United States court, and ultimately came before Justice Swayne, of the Supreme Court of the United States, for review. They plead in that case, among other things, that the law under which this transfer of the case from the State to the United States courts was made, was unconstitutional. After wading through a very long and elaborate examination of the subject, covering nearly four columns of close type in the Cincinnati Daily *Gazette*, that learned jurist came to this conclusion:

"We entertain no doubt of the constitutionality of the act in all its provisions."

Every Senator knows that in multitudes of cases originating under laws of Congress, which Senators on the other side pronounced unconstitutional when they were under consideration before this body and the other branch of Congress, these laws have been uniformly held to be valid. I might refer to cases arising in the attempt to break the blockade, and also originating in the law confiscating the property of rebels. I do not now remember a single case adjudicated by a court of the United States, where the court has held that any one of these laws was in conflict with the Constitution of the United States. Then, with what show of reason are these charges, which, if they were made elsewhere, I would pronounce equally impudent as brazen, brought against the majority of Congress of having willfully violated the Constitution of the United States, when, so far as adjudication has extended, they have been uniformly held to be valid?

But, sir, if the court should, in a given case, violate the judicial sense of justice of the majority of the people of the United States, although binding in that one case, it would no more control the policy of this nation than did the decision in the Dred Scott case settle the

question of slavery. It settled the condition of Dred Scott. Under that decision he was deprived of his liberty most effectually during his natural life; but it became ineffective in regard to the policy of the nation, and was presently swept away by the voice of the freemen of this Republic. And so would it be if the Supreme Court of the United States, in any case hereafter to arise, were to violate the common sense of justice as entertained by the mass of the people of this country.

And that brings me to the last observation I intend to make. Senators on the other side of the Chamber, during this discussion, have told us that the people of the United States have expressed themselves, and that, according to the more recent expression of public opinion, these measures have been found to be unconstitutional. Let us see how these allegations conform to the fact. Elections were held in eighteen States of this Union during the last autumn, either for State offices or for local offices, universally over these States. In these eighteen States there were cast in favor of the policy of Congress 1,628,447 votes, and in favor of the so-called policy of the President 1,603,483 votes, leaving a clear majority of 24,964 in favor of the policy of Congress. Then, sir, include the other nine States now represented in Congress, who voted a short time before, and we find in favor of the policy of Congress 506,026 votes, and in favor of the policy of the President 396,733 votes, leaving a clear majority of 109,293, which, added to the majority previously named, gives a majority in the aggregate of 134,251 votes. This, therefore, is the most recent expression of public opinion on this subject. Those who maintain that these laws are constitutional find themselves in a majority of over 134,000, when they take their appeal to the great jury-box of the country.

But, sir, Senators tell us that this majority is much less than that by which their political friends were overwhelmed the year before. That is true; and I think the reason may be said to be this: When this last expression of opinion was taken by these jurors sitting in the national jury-box, they tried local State issues; their opinions were partially colored by national policy, and were so far colored as to overwhelm the opponents of Congress. But when were the issues joined between the President and Congress tried? Why, sir, manifestly when the members of Congress returned to their constituencies for an approval or a disapproval of their conduct. One year ago last autumn these public servants went home to their constituencies. A direct conflict between the Executive and the Representatives of the people had occurred. The President took an appeal to the people and peregrinated all over the country, from the Atlantic to the Mississippi, making speeches in favor of his own policy, supported by leading members of his Administration.

The members of Congress went home in a more humble capacity, and joined issue with the President; and the jury impaneled in that case returned majorities far exceeding the majorities by which these members had been previously elected. The issues between Congress and the President were decided the year before, when the men who sustained the President's policy were buried so far beneath the flood of public indignation that they could hardly hope for a resurrection. Now they find they have not been so badly beaten when the questions decided are more of a local than of a general character; but that, nevertheless, the people have recorded a verdict against them, numbering in the aggregate a majority of more than one hundred and thirty-four thousand. Then, sir, why do not these ten Senators join with the forty-three and carry out this most recently expressed will of our countrymen, recorded at the ballot-box?